**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 30502**

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| **STATE OF IDAHO,** | ) | **2007 Opinion No. 34** |
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| **Plaintiff-Respondent,** | ) | **Filed: May 30, 2007** |
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| **v.** | ) | **Stephen W. Kenyon, Clerk** |
| | ) | |
| **SARAH KATHLEEN PEARCE,** | ) | |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Juneal C. Kerrick, District Judge.

Judgments of conviction for conspiracy to commit robbery, robbery, conspiracy to commit first degree kidnapping, first degree kidnapping, aggravated battery, and aiding and abetting attempted first degree murder, affirmed.

Greg S. Silvey, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

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GUTIERREZ, Judge

Sarah Kathleen Pearce appeals from her convictions for conspiracy to commit robbery, robbery, conspiracy to commit first degree kidnapping, first degree kidnapping, aggravated battery, and aiding and abetting attempted first degree murder. We affirm.

## I.
## FACTUAL AND PROCEDURAL SUMMARY

In the early morning hours of June 15, 2000, as Linda LeBrane was driving eastbound on Interstate 84, she was forced off the road by a vehicle carrying three men and one woman. The woman, later identified as Pearce by LeBrane and other witnesses who saw the group prior to and after the attack, entered LeBrane's vehicle and unlocked her driver's side door. The three men, since identified as John David Wurdemann (John), Kenneth Wurdemann (Kenneth), and Jeremy Sanchez, along with Pearce forced LeBrane from her vehicle and demanded money

and/or drugs. John, Sanchez, and Pearce punched, struck, stabbed, and cut LeBrane with their fists and sharp instruments while Kenneth struck LeBrane with an aluminum baseball bat. The assailants took money and property from LeBrane, including a credit card, and transported her to a location on Farmway Road in Canyon County. LeBrane was again forced from the vehicle, beaten, stabbed, cut, and struck repeatedly before John and Sanchez set fire to her vehicle. The group left her lying in the dirt at the scene.

Pearce was charged by indictment on March 13, 2003, which alleged that she was the female assailant. At trial, Pearce steadfastly contended she was not the woman involved. Her defense rested, in part, on the allegedly questionable ability of LeBrane to identify the female perpetrator. Evidence at trial indicated that prior to the attack LeBrane had smoked two marijuana cigarettes and was "loaded" by the time her car reached the Caldwell area. Additionally, during the attack, LeBrane lost her glasses. Although the point at which she lost them is not clear, she did admit that she is nearsighted and unable to see without them. In the course of the investigation, LeBrane incorrectly identified two different women in two separate photo lineups, in which Pearce was not featured, as being the female involved. When questioned at trial, LeBrane admitted the first woman she identified was the one most resembling the composite picture created after the incident[1] and that the second was the woman most resembling the actress who portrayed the female assailant in a television episode of *America's Most Wanted* featuring the crime. LeBrane eventually identified Pearce in the third lineup, which was a video lineup not containing any persons from the previous two lineups. Notably, until the video lineup was shown to LeBrane, she had maintained the female perpetrator was Hispanic. There were no Hispanic women in the video lineup.

The methods employed in showing LeBrane the photo and video lineups were called into question at trial. Robert Miles, a detective with the Canyon County Sheriff's Office and the primary investigator on the case, testified that he had never received any training on how to conduct a photo lineup. In addition, when Miles instructed LeBrane regarding the photo lineup, he told her to identify the person who "most closely resembled" the perpetrator rather than

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[1] Carrie Parks, the forensic artist who prepared the composite of Pearce, testified at trial that the eyes described to her by LeBrane were too large for an adult due to LeBrane's intense anger for her attacker and that LeBrane's emotions were preventing her from giving an accurate description.

telling her to pick the perpetrator if she was in the lineup. He noted that in one photo lineup, after LeBrane identified one person who she was positive was the female assailant, he told LeBrane that she had picked the wrong person. With respect to the video lineup, Miles notified LeBrane prior to her identification that the lineup contained a person of interest.

In addition to LeBrane, several other people who allegedly saw the four perpetrators near the time and place of the attack identified Pearce as the female in the group, both in lineups and eventually in court. Keith Mower, who encountered the group at a rest stop on the night of the attack, identified Pearce as the female accompanying the Wurdemann brothers and Sanchez, in a video lineup and later at trial. Steve Rupert, a clerk at a motel where the perpetrators allegedly stopped after the attack also identified Pearce, in the video lineup and in court, as having been with the three men. Similarly, his son, Joseph Rupert identified Pearce in the video lineup and at trial as having been at the motel with the men convicted in the attack.

In support of her defense, Pearce offered the testimony of Dr. Charles Honts, a psychology professor at Boise State University, to testify as an expert regarding the reliability of eyewitness identification, including commentary on lineup procedures. The state moved to exclude the testimony of Dr. Honts prior to trial. The district court responded by allowing Dr. Honts to testify as an expert witness, but limiting his testimony to the characteristics of memory without relation to the identifications in Pearce's case. Additionally, the court did not allow Dr. Honts to testify regarding lineup techniques and resulting identifications in general, finding he was not sufficiently qualified as an expert in this area, as to either his background or his knowledge of the facts of Pearce's case.

Pearce also called Kenneth as a defense witness. Kenneth, who had confessed to his participation in the attack, had previously testified for the state at the trials of his brother, John, and Sanchez, who were both convicted for their involvement in the attack. During one trial he testified that he did not know whether Pearce was the woman involved, but in another trial, he testified that she was not the woman who participated. At Pearce's trial, Kenneth testified on direct examination that he had never seen the female participant prior to the night of the attack and that he did not believe the woman was Pearce. The state then sought to impeach Kenneth's credibility on cross-examination, focusing on his dishonesty throughout the investigation of the crime and his potential motive to lie during his testimony at Pearce's trial.

Following the state's cross examination of Kenneth, Pearce brought a motion to dismiss. She asserted a due process violation based on the state's inconsistent treatment of Kenneth's testimony for different defendants charged with the same crime. Pearce also moved to admit the closing arguments from Sanchez's first trial[2] where the state had asserted that the jury should believe Kenneth's testimony, specifically including that regarding Pearce, and the sentencing argument in Kenneth's case as admissions of a party opponent. The district court denied both the motion to submit the arguments and the motion to dismiss. The jury subsequently found Pearce guilty of all charges except aiding and abetting arson.

On appeal, Pearce asserted the district court erred in refusing to allow Dr. Honts to testify as to lineup procedures and resulting identifications, not instructing the jury as to the weaknesses of eyewitness identifications, denying her motion to dismiss, and excluding transcripts from prior proceedings. Finding the record insufficient to determine whether the exclusion of certain expert testimony by Dr. Honts was erroneous or whether any such error would be prejudicial, we issued an order for temporary remand, directing the district court to receive an offer of proof by Pearce as to the specific testimony that would have been proffered by Dr. Honts at trial if it had not been excluded by the trial court on the state's motion *in limine*. The district court held an evidentiary hearing on the matter and we now, full record in hand, address Pearce's contentions.

## II.
## ANALYSIS

### A. Expert Testimony

Pearce argues the district court abused its discretion in finding that Dr. Honts lacked the necessary education and experience, as well as the factual background, to testify about police lineup techniques and resulting identifications. The admissibility of expert testimony is discretionary with the trial court and a decision will not be disturbed on appeal absent an abuse of discretion. *State v. Merwin*, 131 Idaho 642, 647, 962 P.2d 1026, 1031 (1998). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether

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[2] Sanchez's first trial ended in a mistrial.

the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

Idaho Rule of Evidence 702 provides, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The five sources of expert qualifications identified in the rule are disjunctive. *State v. Eytchison*, 136 Idaho 210, 213, 30 P.3d 988, 991 (Ct. App. 2001). Therefore, academic training is not always a prerequisite to be qualified as an expert; practical experience or specialized knowledge may be sufficient. *State v. Konechny*, 134 Idaho 410, 414, 3 P.3d 535, 539 (Ct. App. 2000). However, there must be a demonstration that the witness has acquired, through some type of training, education or experience, the necessary expertise and knowledge to render the proffered opinion. *Id*. A witness may be qualified to render opinions about some things within a particular professional field but not others. *Eytchison*, 136 Idaho at 213, 30 P.3d at 991.

The offer of proof presented to the district court regarding the qualification of Dr. Honts was extensive and included the following information. Dr. Honts was a full professor of psychology, the highest rank possible, at Boise State University and previously served as chairman of the psychology department. He held a Ph.D. in psychology. For several years, the primary class Dr. Honts taught at Boise State was the upper division course, "Psychology and Law," which examines how the legal profession and forensics in general make use of psychology. The course covers such topics as eyewitnesses, assessment of insanity and competence, administration of lineups and interviews, polygraph tests, assessment of child witnesses, and jury behavior. In addition, Dr. Honts taught classes in research methods, theory of personality, introduction to psychology, statistics, industrial psychology, and physiological psychology.

Dr. Honts also testified that he conducts and oversees research projects, which includes work in credibility assessment, including polygraph tests, which is his main area of focus. He had done research on jury behavior, human memory, the susceptibility of eyewitnesses to post-event suggestion, the creation of false memories, basic statistical issues using new statistical techniques, statement analysis (a way of looking at people's statements), and child witnesses.

Concerning specifically his exposure to eyewitness identification and related topics, Dr. Honts testified that not only does he teach and read in these areas, but both eyewitness behavior and the administration of lineups were routinely major topics at the American Psychology-Law Society meetings which he regularly attended. He also had supervised two dissertations on related topics, one on the suggestibility of eyewitnesses and the other on the creation of false memories, and provided defense counsel with several relevant articles from psychological journals and the Department of Justice *Eyewitness Evidence Guide*, a policy document outlining how police should conduct lineups and photo spreads. Dr. Honts reiterated that he was in a position to testify, without getting into the particulars of the instant case, as to the general procedures which should be utilized in photo spreads and video lineups to obtain accurate identifications.

As to the phenomenon of unconscious transference, where information derived from one occurrence is attributed to another, Dr. Honts asserted he was generally familiar with the concept and specifically worked in that area when one of the dissertations he supervised concerned the closely related phenomenon of the creation of false memories. He also supervised a dissertation concerning the assimilation of post-event information, which is the impact of the interaction a person has after witnessing an event in introducing new information into the memory.

While Dr. Honts was familiar with the general principles of witness confidence versus the actual accuracy of recollection, he had not specifically done any research in that area. The same was true regarding the weapon focus phenomenon with which he was familiar through reading papers and hearing presentations, but on which he had not done any personal research. He was knowledgeable about, through reading and hearing presentations, the forgetting curve and the effect of stress upon memory accuracy as well as with the feedback factor, arising from two witnesses discussing their observations. He had also done research and publishing concerning sex abuse cases and the determination of the credibility of allegedly abused children--a subject which encompasses recollection, ability to observe, the manner in which they are interviewed, and suggestibility. Relatedly, he had conducted training with both law enforcement and psychologists on how to interview children.

Overall, in addition to his basic education and additional training in certain specialized areas, Dr. Honts had read, researched and/or taught in all areas in which he was being asked to present expert testimony. When further questioned regarding his qualifications in areas where he

had not personally conducted research, he explained that no individual psychologist can work in every area and produce research, but that each has one or more areas of particular focus and familiarity. Additionally, he testified that psychologists often teach in areas they are educated in, not just areas where they have conducted particular research and that reading and re-analyzing colleagues' research is a form of research itself.

Following defense counsel's offer of proof, the court precluded Dr. Honts from testifying in regard to photograph and video lineup procedures and resulting identifications on essentially two grounds. First, the court indicated it was "not persuaded, based on the offer of proof, that Dr. Honts posess[ed] the necessary qualifications to testify concerning these issues." In support of this conclusion, the court noted that Dr. Honts had never participated in a police lineup, never conducted a lineup, never spoken with any of the witnesses in the case whose testimony was relevant to these issues, had not viewed the composite drawings involved in the case, had only viewed the video lineups two days prior, had not conducted research in these areas, and had never been qualified as an expert in these areas. However, to testify as to general procedures, there is no requirement that the specialized knowledge of an expert witness include the facts of the case. Further, as stated in *State v. Hopkins*, 113 Idaho 679, 681, 747 P.2d 88, 90 (Ct. App. 1987), "[t]he lack of direct experience is not fatal to [the proposed expert's] qualification but it may affect the weight given his testimony." Thus, the district court's reasoning concerning Dr. Honts's familiarity with the facts of the present case is largely irrelevant in regard to his testimony on eyewitness identifications generally, and his not having conducted his own research on the subjects should not have been fatal to his qualification as an expert since he testified to having sufficient familiarity through other sources.

Second, the court expressed its concern that "any opinion Dr. Honts might offer concerning the particular witness identifications in this case, including, e.g., suggestibility or tainted memories, begins to tread into impermissible ground: the credibility of the witness identification, which is the absolute province of the jury as the finders of fact." This reasoning, however, did not necessarily warrant such a broad exclusion of Dr. Honts's testimony. Such a rationale does not support disallowing Dr. Honts' testimony about procedures and problems associated with lineups and resulting identifications in the abstract. In offering this type of expert testimony, he would not have trod near dangerous territory reserved for the jury. Accordingly, because the district court's reasoning is inconsistent with the applicable legal

standards, we conclude the court abused its discretion in limiting Dr. Honts's testimony in the manner in which it did.

However, we also conclude the district court's selective exclusion of Dr. Honts's testimony amounts to harmless error. Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Therefore, a new trial is unnecessary if the error was harmless. *State v. Scovell*, 136 Idaho 587, 593, 38 P.3d 625, 631 (Ct. App. 2001). An error is harmless if the appellate court is able to say, beyond a reasonable doubt, that the jury would have reached the same result absent the error. *State v. Boman*, 123 Idaho 947, 950-51, 854 P.2d 290, 293-94 (Ct. App. 1993). Here, we are convinced beyond a reasonable doubt that even had Dr. Honts been allowed to testify in general as to the typical procedures and problems inherent in lineups and resulting identifications, the jury still would have found Pearce guilty.

From a scientific standpoint, the generic concerns in regard to lineups and subsequent identifications were sufficiently covered by other testimony offered by Dr. Honts and other witnesses. The district court allowed his expert testimony on the characteristics of memory, the storage of memory (visual versus verbal), the changing of memory, stress as it affects memory and observation, recollection, and how interview techniques may affect memory.[3] On the whole, this testimony touched upon most, if not all, of Pearce's stated objectives in utilizing the expert in the first place--objectives counsel had stated did not include tying his opinions specifically to the identifications in the case at hand. In fact, Dr. Honts himself acknowledged as much in his testimony at the remand hearing, admitting that he was allowed to testify as to almost everything that he had identified as relevant to lineup identifications, but was only precluded from tying this testimony directly to eyewitness identifications, including the specific lineup identifications in the case.

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[3] The trial court listed the areas of Dr. Honts's actual testimony as: perception and memory, visual versus verbal memory, reconstruction of memory, forgetting curve, effect of post-event information, effect of suggestion, effect of trauma on memory, effect of stress and arousal on memory, phenomenon of witness focus, phenomenon of witness confidence, effect of poor interviewing techniques, importance of good forensic interviewing, allowing a witness to talk uninterrupted so there is a free narrative or forensic interview, the difference between recognition and recall, the concerns with self-fulfilling prophecy, the function of the perception, storage, retrieval, and forgetting, weapons phenomenon, and post-event information.

Furthermore, other witnesses' testimony provided the jury with evidence as to optimal lineup standards as well as how the lineups in the instant case were conducted. Carrie Parks, a forensic artist who assisted in creating several composites in the case, testified about the interaction between composites and lineups, emphasizing procedures that should be followed in lineups to assure accuracy. She specifically noted that a lineup administrator should not ask the witness to identify someone "similar to" the perpetrator. Several law enforcement officers also testified that they would not ask a witness to identify, in a lineup, the person who looks "similar to" her recollection of the perpetrator as such a request may impair the accuracy of the identification. In addition, both officers who administered the lineups and the witnesses who made the identifications testified about the procedures followed in the case at hand.[4] So, the jury was presented with general information regarding how lineups are usually conducted (and how they ideally should be conducted) as well as specific testimony as to how the lineups were conducted in this case, and the jury was left to draw the contrast between ideal circumstances and the reality as it occurred here. While Pearce may have preferred Dr. Honts to articulate this contrast, that exclusion was of little significance here because such a connection would be apparent to a layperson who had been provided the necessary scientific information about the preferred methods for lineups. *See e.g., State v. Varie,* 135 Idaho 848, 854-55 26 P.3d 31, 37-8 (2001) (holding that testimony of a specific diagnosis of battered spouse syndrome as to the defendant was permissibly excluded because jurors could draw their own proper conclusions from the expert testimony presented on the characteristics of domestic violence and reactions of victims to such violence in general and evidence of the defendant's past and behavior in the case); *State v. Kay*, 108 Idaho 661, 667, 701 P.2d 281, 287 (Ct. App. 1985) (deciding that, where an expert testified regarding her concerns about the reliability of eyewitness identification, the jury could weigh the identification testimony of the witnesses in light of the information presented by the expert to determine the accuracy of the identification in the case).

In arguing the erroneous exclusion of portions of Dr. Honts's proposed testimony was not harmless error, Pearce concludes that each identification of her as the female attacker was

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[4] Specifically, LeBrane, Mower, the Ruperts and Jeanne Waggoner, an eyewitness who allegedly saw the group prior to the attack, made identifications in the case utilizing one or more lineups and each testified as to their administration. Officers Daily, Miles, and Christie testified regarding how the lineups were administered as well as opined generally on lineup procedures.

suspect, and the jury was not alerted to view it with the skepticism she believes would have been warranted by Dr. Honts's testimony. However, even assuming the identifications should be discounted individually as having been conducted in violation of "best practices," she fails to account for the formidable persuasive value the identifications possessed in concert--as LeBrane, Mower, and the Ruperts each had separately identified her as the culprit. That each witness identified the same woman, while not conclusive, was nonetheless compelling.

Finally, after the jury had been presented with the body of evidence, Pearce's counsel utilized his closing argument to explicitly contend the lineups were procedurally defective and rendered unreliable results. Specifically, counsel pointed out the reticence of at least one witness to make an identification of the female assailant, that the sheriff's office had no policy or procedures for administering lineups, the fallibility of memory and how it manifested in this case, specific procedural problems with the lineups administered in the case, and the fact that LeBrane had initially identified other women in two lineups as the perpetrator and had been confident about those identifications before law enforcement began to focus on Pearce. Thus, referencing the evidence that had come in at trial--including Dr. Honts's testimony--counsel was able to clearly and unequivocally attack the validity of the eyewitness identifications stemming from the lineups in this particular case. He was able to point to the alleged procedural errors in each lineup and argue directly to the jury that such mistakes invalidated the identifications of Pearce as a perpetrator. Once he had finished, there is no doubt the jury had been informed of the connection between Dr. Honts' testimony and the potential for misidentification, both in general and in the instant case.

Ultimately, the jury eventually heard a significant body of evidence attacking the lineup identifications. This fact, in concert with the existence of considerable evidence incriminating Pearce, compels our decision that the exclusion of Dr. Honts's opinions as to lineups and their resulting identifications was harmless error not warranting remedial measures.

**B. Jury Instructions**

Pearce asserts the district court also erred in failing to instruct the jury on the dangers inherent in eyewitness identification. Pearce argues the jury should have been instructed on factors to consider in determining the accuracy of eyewitness identifications.

Whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Gleason*, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992). When

reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993).

As a preliminary matter, Pearce asserts she has not waived the right to appeal the omission of a specific jury instruction as to eyewitness identifications by not objecting to the omission at trial. Pearce notes that her case was tried before the amendment of I.C.R. 30, which requires objection to an instruction to preserve the issue for appeal. Prior to the amendment of I.C.R. 30, the failure to object to an instruction at trial in a criminal case did not constitute a waiver of any objection to the instruction on appeal. *State. v. Cuevas-Hernandez*, 140 Idaho 373, 375, 93 P.3d 704, 706 (Ct. App. 2004).

We disagree. Pearce may not assert as error the trial court's failure to give an instruction she did not request. In *State v. Eastman*, 122 Idaho 87, 90 831 P.2d 555, 558 (1992), the defendant argued the district court had a duty to *sua sponte* instruct the jury on the defendant's theory of the case, which was a defense of necessity. The Idaho Supreme Court disagreed, determining that "[t]he defendant's argument would mandate the trial court to instruct the jury upon any defense theory possible." *Id*. The Court ruled that while a defendant is entitled to an instruction where there is a reasonable view of the evidence presented in the case that would support the theory, it is incumbent upon the defendant to submit a requested instruction or in some other manner apprise the district court of the specific instructions requested as "the trial court is not obligated to determine on its own what theories to instruct the jury on." *Id*. at 90-91, 831 P.2d 558-59. The Idaho Supreme Court clarified the distinction between omission of a proposed jury instruction and failure to request the instruction at all in *State v. Gomez*, 126 Idaho 83, 86 n.2, 878 P.2d 782, 785 n.2 (1994), stating that:

> We further note that [not requesting a specific jury instruction] is distinguishable from the situation in which the Court has held that a defendant does not waive the right to a jury instruction by the failure to object to that instruction at trial. *State v. Smith*, 117 Idaho 225, 786 P.2d 1127 (1990). *Smith* does not stand for the proposition that a defendant can fail to request a jury instruction and later allege error in the failure to give it.

As Pearce has not demonstrated that she requested the instruction at trial, we will not address this issue further on appeal.

**C. Motion to Dismiss**

At trial, Pearce called Kenneth to testify in her defense. Kenneth had previously pled guilty to his role in the attack and had testified as a state witness in the two trials of Jeremy Sanchez. At Sanchez's first trial, Kenneth testified that his brother John and Sanchez were the other male assailants. Kenneth also testified he did not know the female assailant, but that it was not Pearce. During Sanchez's second trial, Kenneth testified consistently as to the male assailants but then stated that he did not know whether Pearce was the female involved. Finally, at Pearce's trial Kenneth again testified that he did not believe Pearce was the female assailant. Subsequently, the state attempted to impeach Kenneth's credibility by using instances of his dishonesty throughout the investigation of the crime, while at the trials of Sanchez it had defended Kenneth's credibility despite defense counsel's similar attack on his veracity utilizing essentially the same instances of dishonesty.

Pearce contends the state's changing of positions in different trials regarding Kenneth's credibility as a witness violated her constitutional right to due process. The standard of review for claims of constitutional violations is one of deference to factual findings supported by substantial evidence, but we exercise free review in the application of the constitutional principles to the facts once established. *State v. Avelar*, 124 Idaho 317, 322, 859 P.2d 353, 358 (Ct. App. 1993). The Due Process clause guarantees every defendant the right to a trial comporting with basic tenets of fundamental fairness. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24-25 (1981); *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965).

Pearce argues the state's conduct in her trial is analogous to the circumstances of *Thompson v. Calderon* 120 F.3d 1045, 1058-59 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U.S. 538 (1998), where a plurality of the Ninth Circuit found the state of California violated a defendant's due process right by arguing at Thompson's trial that he alone committed a murder, while arguing at a subsequent trial that another defendant committed the same murder. The court held that the prosecutor, by discrediting the evidence he had used in a previous trial that a different defendant was the solitary offender, violated his prosecutorial duty to "vindicate the truth and to administer justice." *Id.* at 1058. Ultimately the court held that "it is well established that when no new significant evidence comes to light, a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Id.* Several other circuits have followed suit. *See Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000) (finding that use of a witness's first statement in the trial of one defendant and

then that witness's second, contradictory statement in a subsequent trial against another defendant to convict them of the same crimes was violative of due process); *Stumpf v. Mitchell*, 367 F.3d 594, 611 (6th Cir. 2004) cert. granted sub nom. *Mitchell v. Stumpf*, 125 S. Ct. 824 (2005) (holding that a prosecutor's argument at the first defendant's trial that it was the first defendant who shot the victims and then the use of a jailhouse informant's testimony at a second defendant's trial that it was the second defendant who fired the deadly shots violated due process because it rendered the convictions unreliable).

However, the instant case is factually distinct from these federal circuit cases. Here, the state changed its *position* regarding a witness's credibility, whereas in the federal circuit cases, the state changed its *theory and evidence* regarding who committed the crime. *See State v. Sanchez*, 142 Idaho 309, 322-23, 127 P.3d 212, 225-26 (Ct. App. 2005). Thus, where the federal circuit courts above were guarding against multiple defendants being convicted for having committed the same crime which the evidence showed could only have been committed by one of them, the situation here does not present that danger. This is not a frivolous distinction. The *Calderon* court itself recognized the difference, citing to an opinion by then-Judge Kennedy where he concluded that "reversal is not required when the underlying theory 'remain[s] consistent.'" 120 F.3d at 1059 (quoting *Haynes v. Cupp*, 827 F.2d 435, 439 (9th Cir. 1987)). Post-*Calderon*, this Court, the Ninth Circuit, and other courts have explicitly recognized that not every prosecutorial variance amounts to a due process violation. *See e.g., Sanchez*, 142 Idaho at 322, 127 P.3d at 225 ("[T]o violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants accused of the same crime." (citing *Groose*, 205 F.3d at 1052)). In *Nguyen v. Lindsey*, 232 F.3d 1236, 1240 (9th Cir. 2000), the court distinguished *Calderon* in an instance where the defendant contended the prosecutor making different arguments at each co-defendants trials as to who shot first amounted to a due process violation. The court relied on the fact that the prosecutor "presented the *same underlying theory* of the case at each trial--when a shot kills a third person in a voluntary gun battle, the initiator and those who voluntarily took part in the mutual combat are responsible for the crime." *Id.* (emphasis added). Regarding who took the first shot, the court recognized the prosecutor made different arguments at each trial but that "these arguments were consistent with the evidence actually adduced at each trial." *Id.* Unlike in *Calderon*, both defendants could be guilty of the same crime due to the nature of the crime. *Id. See also State v. Moody*, 94 P.3d 1119, 1134 (Az.

2004) ("[The defendant] is only one person, and the theories offered are not necessarily inconsistent. Thus, [*Calderon*] is inapposite.").

In this case, the prosecution was not advancing a different theory or inconsistent evidence in challenging Kenneth's credibility at Pearce's trial. On the contrary, the state maintained throughout each trial that Sanchez, Kenneth, John, and Sarah Pearce were all culpable in the attack. Therefore, rather than relying on cases where inconsistent theories were at issue, a better analogy is *United States v. Hozian*, 622 F.2d 439 (9th Cir. 1980). In *Hozian*, at 442, the prosecution offered the testimony of a convicted co-defendant in the subsequent trial of an accomplice despite the fact that he had been impeached by the prosecution when asserting his own innocence in a prior proceeding. The defendant argued this was improper, but the court rejected his argument presumably finding no due process issues and concluding the defendant had the opportunity to impeach the witness's credibility himself and "nothing more was required." This is exactly the approach we took in addressing the appeal of Sanchez, a co-assailant, when he argued the same issue before this Court. Sanchez contended his due process rights were violated by the state presenting Kenneth as a credible witness at his trial and then portraying him as not credible when he was called as a witness by the defense in Pearce's trial. Concluding the situation was different than those cases where the state presents separate and irreconcilable theories of guilt, we held that in both trials the state's position regarding the assailants' respective roles remained the same and decided that Sanchez did not suffer a violation of his due process rights. *Sanchez*, 142 Idaho at 322-23, 127 P.3d at 225-26.

So, while a prosecutor, as the agent of the people and the state, has the unique duty to ensure a fundamentally fair trial by seeking not only to convict, but also to vindicate the truth and to administer justice, courts have largely recognized the limits of punishing prosecutors for apparent inconsistencies in their approach to criminal trials absent a "core" inconsistency. *See Sanchez*, 142 Idaho at 322, 127 P.3d at 225 (citing *Groose*, 205 F.3d at 1052). We also note there is no evidence the prosecution in this case engaged in premeditated manipulation of evidence. In the previous trials, the state had relied on Kenneth's testimony that his brother John and Sanchez were the other male assailants--testimony from which Kenneth did not waiver throughout the trials. In contrast, during Pearce's trial, the state was faced with Kenneth's somewhat fluctuating testimony regarding the identity of the female assailant. Forcing the prosecution to simply accept his assertions and abstain from impeachment since it had bolstered

his credibility when it had utilized a different portion of his testimony would essentially strip the state of an integral tool in its trial arsenal. For the reasons discussed above, we conclude Pearce did not suffer a violation of her due process right, and the district court did not err in denying Pearce's motion to dismiss.

**D. Motion to Admit Prior Prosecution Arguments**

Having found no due process violation due to the prosecution's differing treatment of Kenneth's credibility, we now address whether the district court erred in not allowing the prosecution's arguments from Sanchez's first trial and Kenneth's sentencing hearing to be presented to the jury in Pearce's trial as evidence of the inconsistency.[5] The trial court has broad discretion in the admission of evidence at trial and its judgment will be reversed only where there is an abuse of that discretion. *State v. Howard*, 135 Idaho 727, 731-32, 24 P.3d 44, 48-49 (2001); *State v. Zimmerman*, 121 Idaho 971, 973-74, 829 P.2d 861, 863-64 (1992).

The admissibility of prosecutors' statements in related cases as admissions of a party opponent is an issue of first impression in Idaho. It is an area of law that has been significantly fractured and historically such statements were rarely admissible.[6] While some courts persist in

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[5] The state contends this issue is not properly on appeal because Pearce did not challenge the district court's actual ruling. It asserts the district court denied the motion on the grounds that Pearce had failed to present any evidence of an "admission" of a party opponent, and since Pearce does not specifically challenge this reasoning on appeal, she has failed to show error in the court's ruling. We disagree. The state's brief implies the district court's reasoning for denying the motion was unequivocally a lack of proffer. However, we read the transcript differently and are convinced the ruling is more ambiguous. While the court does mention it did not receive a specific presentation of Pearce's proposed evidence, it is not clear this was the reasoning for denying the motion; in fact, the court prefaced its ruling by saying "based on what has been presented . . ." implying it was willing to (and did) deny the motion and reserve ruling without a formal proffer. Furthermore, while the court expressed some dismay at the lack of evidence before the court, we note that it would have been somewhat unreasonable to automatically deny the motion on this ground given that Pearce had been afforded virtually no time to gather the evidence--the cross examination having occurred on Friday afternoon and the motion having been filed Monday morning--and counsel's assertion it was in the process of obtaining the necessary transcripts. We think it unlikely the court would have acted so cursorily and assume it was, despite unclear articulation, actually a ruling on the merits. Therefore, we address the substance of Pearce's claim.

[6] *See* Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat its Words?*, 87 MINN. L. REV. 401, 406-08, 412-18 (2002).

refusing to admit such statements as party admissions under Federal Rule of Evidence 801(d)(2), *see e.g.*, *United States v. Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997), relatively recently several federal courts have endorsed generally the use of inconsistent prosecutorial statements in concluding they are not *per se* inadmissible. The most prominent approach was introduced in the seminal case, *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), where the Second Circuit held that statements of the defendant's attorney in a criminal case are admissible in a subsequent trial as an admission of a party opponent where they are: (1) "assertion[s] of fact . . . equivalent [to a] testimonial statement[] by the [client]; (2) "inconsistent with similar assertions in a subsequent trial"; and (3) not subject to an innocent explanation for the inconsistency.[7] *Id*. at 33. In *United States v. Salerno*, 937 F.2d 797, 811-12 (2d Cir. 1991), rev'd on other grounds 505 U.S. 317, 322 (1992), the Second Circuit specifically applied the *McKeon* factors to prosecutorial statements. There, the court allowed the admission of certain statements where the prosecutor, in a previous trial, had characterized the defendant contractor as the victim of extortion by a RICO enterprise, but in a subsequent bid-rigging trial had attempted to paint him as culpable in the scam. 937 F.2d at 811-12. *See also U.S. v. DeLoach*, 34 F.3d 1001, 1005-06 (11th Cir. 1994) (citing to *McKeon* and *Salerno*, the court upheld the exclusion of prosecutor's statements from the earlier trial of co-defendant where prosecutor argued against DeLoach's culpability in the first trial and for it in the second after finding they were not statements of fact and were not inconsistent with the government's position in its prosecution of DeLoach).[8]

While Pearce relies on the reasoning of these cases, specifically *Salerno*, to support her contention for admission, a closer examination shows they actually refute it. Both *McKeon* and

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[7] Furthermore, the court listed five factors to be considered when evaluating admissibility: the prospect that free use of attorney statements from prior trials will "consume substantial time to pursue marginal matters," the risk of inviting unfair inferences from inconsistent positions, the possibility of deterring of "vigorous and legitimate advocacy," the risk that forcing explanation of inconsistency may "expose work product, trial tactics, or legal theories" thus compromising the client's rights, and the risk that admission will require the removal of the attorney who made the prior statements. *McKeon*, 738 F.2d at 32-33.

[8] Some courts have adopted a more permissive approach to the admission of prosecutorial statements by conducting a simple F.R.E. 801(d)(2) analysis without also applying the *McKeon* factors. *See United States v. Katter*, 840 F.2d 118, 130-31 (1st Cir. 1998); *United States v. Bakshinian*, 65 F.Supp.2d 1104, 1106-09 (C.D. Cal. 1999). We, however, reject this approach as it fails to afford even minimal deference to prosecutorial statements which have traditionally been inadmissible entirely.

*Solerno* recognized that "serious collateral consequences could result from the unbridled use of such statements," *Solerno*, 937 F.2d at 811, thus necessitating the guidelines explored above. In fact, the *McKeon* court carved out an explicit limitation to admissibility saying that "[s]peculations of counsel, *advocacy as to the credibility of witnesses*, arguments as to weaknesses in the [opponent's] case or invitations to a jury to draw certain inferences . . . " were excluded from its pronouncement admitting certain prosecuting attorney statements. *McKeon*, 738 F.2d at 33 (emphasis added). The court implied these were not statements of fact equivalent to testimonial statements by the client, but constituted advocacy regarding witness credibility and inferences to be drawn from the evidence. *Id. Accord Salerno*, 937 F.2d at 811 (requiring prosecutor's inconsistent statement to be one of fact if admission is to be appropriate). This limitation recognizes and respects the prosecutorial role in the trial process; as a California appellate court has articulated, "The prosecutor, after all, [is] neither a participant nor a witness, and has no knowledge of the facts other than those gleaned from the witnesses and other available evidence." *People v. Watts*, 76 Cal. App. 4th 1250, 1263 (1999).

Here, the evidence Pearce seeks to admit concerns statements made while the prosecutor was engaged in "advocacy as to the credibility of witnesses," a circumstance under which *McKeon* specifically stated an attorney's comments should not be admissible in a subsequent, related proceeding. 738 F.2d at 33. *See also DeLoach*, 34 F.3d at 1005-06 (upholding lower court's exclusion of statements by attorney made during closing arguments); *People v. Cruz*, 643 N.E.2d 636, 664-65 (Ill. 1994) (affirming the exclusion of evidence of the prosecution's strategy in an earlier, related trial due to competing policy concerns); *People v. Morrison*, 532 N.E.2d 1077, 1088 (Ill.App.Ct. 1988) (refusing admission of a prosecutor's closing argument given in the co-defendant's prior trial). Consequently, we conclude the district court did not abuse its discretion in excluding evidence of the prosecutor's prior statements, made in the course of the Sanchez trial and in Kenneth's sentencing proceeding, concerning Kenneth's credibility.

## III.

## CONCLUSION

While the district court did err in excluding Dr. Honts's testimony on the subjects of lineup procedures and resulting identifications since his qualifications were sufficient to opine as to general principles in the area, we determine this error was harmless because a significant amount of information relating to the topics was eventually admitted through other witnesses,

and we are not convinced that Dr. Honts's testimony on these issues specifically would have changed the outcome. Pearce's contention that the district court erred in failing to instruct the jury on the fallibility of eyewitness identification is not properly before this court since Pearce cited to no instance in the record where she requested this proposed jury instruction, thus precluding our consideration of the issue. The district court also did not err in denying Pearce's motion to dismiss based on her argument that the prosecutor's having taken inconsistent positions in different trials regarding the credibility of Kenneth was a violation of due process. For a due process violation to occur, there must exist a "core" inconsistency, and discrepancies regarding the credibility of a witness do not suffice. Finally, the district court did not abuse its discretion in refusing to admit evidence of the prosecution's prior inconsistent statements regarding Kenneth's credibility as admissions of a party opponent. Accordingly, we affirm Pearce's judgment of conviction for conspiracy to commit robbery, robbery, conspiracy to commit first degree kidnapping, first degree kidnapping, aggravated battery and aiding and abetting attempted first degree murder.[9]

Chief Judge PERRY and Judge LANSING **CONCUR**.

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[9] Affirming, we do not ignore or take lightly the defective lineup techniques employed in this case. In this day and age, officers who conduct lineup procedures should be required to be trained and made aware of the vast body of information that is readily available about proper lineup methods and about the elevated risks of false identifications when improper methods are used.